

ALLAHABAD HIGH COURT

Mahabir Prasad Niranjnlal

Vs.

Commissioner of Income Tax

Misc. Case No. 83 of 1949

(Malik, C.J., Mootham and V. Bhargava, JJ.)

17.12.1954

JUDGMENT

Malik, C.J.

1. This is a reference under Section 66(1) of the Indian Income-tax Act. The questions originally referred to this Court were as follows :

"1. (a) Whether an order passed by an Appellate Assistant Commissioner refusing to admit an appeal by holding that it was not presented within time is an order under Section 30, Clause (2), of the Income-tax Act or under Section 31 of the Act?
(b) Whether an appeal is competent to the Tribunal from such order?"

2. An application was filed under Section 66(2), Income-tax Act, stating that certain other questions of law arose out of the Appellate Order and praying that those questions should also be referred to this Court for decision. By an order of this Court dated 19-9-1950, the Appellate Tribunal was directed to refer certain other questions, and as a result of that order a fresh reference was made and besides the questions mentioned above three other questions were framed which were as follows :

"2. Whether an appeal to the Appellate Assistant Commissioner was or was not filed within time i.e. whether the assessee was entitled to a deduction of the whole period between 15th May, 1946 to 7th August, 1946 or only the period between 16th May, 1946 and 19th July, 1946?

3. Whether an appeal lies to the Tribunal in a case where the appeal to Appellate Assistant Commissioner was really not barred by limitation but was within time and the Appellate Assistant Commissioner has refused to admit it?

4. Whether the Tribunal was entitled to consider whether the grounds for condonation of

the delay were or were not sufficient where the Appellate Assistant Commissioner had refused to condone the delay?"

3. The assessee is Mahabir Prasad Niranjnlal of Banaras, the assessment year being 1945-46. On 30-4-1946, the Income-tax Officer passed the assessment order and on 11-5-1946, a notice of demand was served on the assessee. On 15-5-1946, the assessee applied for copies of the assessment order. This application was received by the Income-tax Officer at Kanpur on 16-5-1946. On 19-7-1946, the Income-tax Officer sent the copies by registered post but they were not delivered to the assessee till 7-8-1946. On 2-9-1946, the assessee filed an appeal before the Appellate Assistant Commissioner, but the Appellate Assistant Commissioner refused to admit the appeal on the ground that the appeal was barred by limitation.

4. Under Section 30(2), Income-tax Act, an appeal has to be filed within thirty days. The relevant portion of the section reads:

"The appeal shall ordinarily be presented within thirty days of receipt of the notice of demand relating to the assessment....."

5. Under Section 67A the day on which the order complained of was made and the time requisite for obtaining a copy of such order has to be excluded.

6. On behalf of the assessee, it was claimed before the Appellate Assistant Commissioner that the time between 15-5-1946, and 7-8-1946, was the time requisite for obtaining the copies. The Appellate Assistant Commissioner, however, held that time up to 19-7-1946, could be excluded but not up to 7th of August. He accordingly held that the appeal had been filed beyond time and there was no sufficient cause for condonation of the delay. Against that order, an appeal was filed before the Appellate Tribunal. The Appellate Tribunal agreed with the Appellate Assistant Commissioner that time could be excluded only up to 19-7-1946, the date on which the copy was issued to the assessee by post, and not up to 7-8-1946, when the copy was received by him. The Appellate Tribunal also held that the order of the Appellate Commissioner refusing to admit the appeal for hearing was an order under Section 30, Clause (2) and, as such, not appealable under Section 33 of the Act.

7. The question that arises for consideration is whether the order passed by the Appellate Assistant Commissioner on 25-11-1946, refusing to admit the appeal was an order under Section 31. If it was not an order under Section 31, then no appeal lay to the Tribunal under Section 33 of the Act and there could be no reference to this Court under Section 66.

8. The first point to which our attention has been drawn is the use of the word 'ordinarily' in Section 30, sub-section (2) and it has been urged that an Appellate Assistant Commissioner can accept the appeal even if it is filed beyond 30 days if the delay is only of a few days. We do not

think that the word 'ordinarily' affects the period of 30 days. The word has probably been used as the Appellate Assistant Commissioner has the right to admit an appeal filed after the expiration of the period if he is satisfied that the appellant had sufficient cause for not presenting it within time.

9. The other argument of learned counsel was that whenever a memorandum of appeal is presented to the Appellate Assistant Commissioner, whatever the defect in it may be, whether beyond time or within time, whether it is in the prescribed form and is verified in, the prescribed manner or not, it is an appeal which has to be disposed of by an order made under Section 31(3) of the Indian Income-tax Act. Learned counsel, however, in view of certain decisions of the Supreme Court modified this statement which he had based on the decisions of the Calcutta and Madras High Courts in - '*Gour Mohan Mullick v. Commr. of Agricultural Income-tax, West Bengal*¹', and - '*Commissioner of Income Tax, Madras v. Shahzadi Begum*²', and urged before us that if the following three requirements are satisfied, the order must be an order under Section 31:

- (a) The Appellate Assistant Commissioner has fixed a date for the hearing of the appeal presented to him;
- (b) the appeal has been disposed of; and,
- (c) the effect of the order is to confirm, reduce, enhance or annul the assessment.

For the proposition that a defective memorandum of appeal is nevertheless an appeal, learned counsel has relied on a decision of the Privy Council in - '*Nagendra Nath v. Suresh Chandra*³', which was followed by the Supreme Court in - '*Raja Kulkarni v. State of Bombay*⁴', In the latter case, their Lordships of the Supreme Court held, following the Privy Council, that

"any application by a party to the Appellate Court to set aside or revise a decree or order of a Court subordinate thereto is an 'appeal' within the meaning of the above provisions, even though it is irregular or incompetent, or the persons affected by the application to execute were not parties, or it did not imperil the whole decree or order."

10. The argument was that as a defective memorandum of appeal or a memorandum of appeal presented beyond the period of limitation was still an appeal it could be disposed of only under Section 31; and even though an order rejecting a memorandum on the ground that it is defective or it is barred by limitation may not strictly come within the ambit of any of the sub-sections of Section 31, in effect it amounts to an order confirming the assessment and is, therefore, an order under Section 31(3)(a).

11. The point arose for the first time in this Court in - '*Shivnath Prasad v. Commissioner of Income Tax, Central and United Provinces*⁵',. In that case the appeal had not been presented within time and the Appellate Assistant Commissioner not being satisfied that sufficient cause had been made out refused to admit the appeal. It was held that his order was not an order under

section 31. This view was followed by a Bench of this Court in the '*Municipal Board, Agra v. Commissioner of Income Tax, United Provinces*⁶', In - '*Mohd. Nain Mohd. Alam v. Commissioner of Income Tax, U.P.*⁷.', the Appellate Assistant Commissioner had passed an 'ex parte' order admitting the appeal and condoning the delay under Section 30, sub-section (2), but later, after having heard the other side, he decided against the assessee and dismissed the appeal on the ground that it was time-barred. It was held by a Bench of this Court that this was an order under Section 31.

In - '*Special Manager, Court of Wards, Naraindas Narsinghdas v. Commissioner of Income Tax, U.P.*⁸. it was held that an order by an Appellate Assistant Commissioner refusing to condone the delay in the filing of an appeal was an order under Section 30(2), but that if the appeal was in fact within time, it might be

¹ AIR 1954 Cal 468

³ AIR 1932 PC 165 at pp.166-167

⁵ AIR 1935 All 572

² AIR 1952 Mad 232

⁴ AIR 1954 SC 73 at pp.74-75

⁶ AIR 1952 All 249

⁷ AIR 1952 All 143

⁸(1950) 18 ITR 204 (All)

possible to urge that it was an order under Section 31, but the point was not decided. In - '*K.K. Porbunderwalla v. Commissioner of Income Tax, Bombay City*⁹', an Appellate Assistant Commissioner had passed an order holding that an appeal was time barred and refusing to condone the delay. The Court held that that order, so far as it rejected the appeal on the ground that it was barred by limitation, was an order under Section 31, but that so far as it refused to condone the delay was an order under Section 30 (2). The learned Chief Justice observed:

"that it was not the intention of the Legislature that in a case where the Appellate Assistant Commissioner takes the view that the appeal is barred by limitation, his view should be final and should not be challenged before the Tribunal. The Appellate Assistant Commissioner may take the view that the appeal is barred by limitation on various grounds; he may hold that the appeal is barred on appreciation of evidence as to facts, he may consider that the appeal is barred by limitation on an interpretation of the law, but in every case his decision is subject to a challenge before the Tribunal."

In '*Padampat Singhania v. Commissioner of Income Tax U.P. and Ajmer-Merwara*¹⁰', this Court followed the view of the Privy Council in - '*Commissioner of Income Tax, Bombay Presidency and Aden v. Khemchand Ramdas*¹¹', and of the Lahore High Court in - '*Duni Chand v. Commissioner of Income Tax*¹²', that where an order could have been passed under a particular provision of law purporting to have been made under some other provision, the Court would consider it as an order under a section which really applied and not the section mentioned in the order.

12. When a memorandum of appeal is presented before an Appellate Assistant Commissioner after the expiration of the period fixed, Section 30 (2) provides that he may admit the appeal if he is satisfied that the appellant had sufficient cause for not presenting it within time. If an appeal is presented after the expiration of the period fixed and the Appellate Assistant Commissioner is

not satisfied that the appellant had sufficient cause for not presenting it within that period, he is bound to reject the appeal. The only order that can, therefore, be passed under Section 30 is an order condoning or refusing to condone the delay where the appeal is time barred and the consequential order admitting or refusing to admit the appeal. Section 30 does not provide for the passing of any other order by an Appellate Assistant Commissioner. An order passed one way or the other at the time of the presentation of an appeal beyond time must, therefore, be an order under Section 30, sub-section (2).

13. When a memorandum of appeal is presented to an Appellate Assistant Commissioner within the period fixed under the Income-tax Act, Section 30 does not lay down how it is to be dealt with. Under Section 31 (1) a date and the place for hearing has then to be fixed. If, however, the appellate Assistant Commissioner instead of fixing a date and place for the hearing of the appeal rejects the appeal under the mistaken impression that it is time barred and there is no sufficient cause for condonation of the delay, the question will arise whether the order passed by him can be deemed to be an order under Section 31.

⁹ AIR 1952 Bom 157

¹¹ AIR 1938 PC 175

¹⁰ AIR 1953 All 775 at pp.776-777

¹² AIR 1929 Lah 593 at p.594 (FB)

14. In view, however, of the latest decision of the Supreme Court in - '*Commissioner of Income Tax, Madras v. Arunachalam Chettiar*¹³', this question can no longer be said to be an open question. In that case the Income-tax Officer made an assessment order on the 23rd of January, 1942. There was an appeal to the Appellate Assistant Commissioner who reduced the assessment by an order dated 25-5-1942. There was a further appeal to the Appellate Tribunal which gave certain directions and allowed the appeal in part by an order dated 20-8-1943. On 26-9-1945 the Income-tax Officer purported to follow the directions of the Appellate Tribunal and amended his previous assessment order. He, however, issued no fresh notice of demand under Section 29. The assessee filed an appeal before the Appellate Assistant Commissioner who rejected the appeal by an order dated 19-11-1945, on the ground that no appeal lay to him. The assessee then made an application to the Appellate Tribunal which passed an order on 20-2-1946, by which it amended the order of the Income-tax Officer dated 26-9-1945. The question arose whether the order of the Appellate Tribunal dated 20-9-1946, could be said to be an order under Section 33, Income-tax Act, so that a reference could be made to the High Court. The Supreme Court held that it was not such an order. The ground taken was firstly, that the order of the Income-tax Officer dated 26-9-1945, was not an order under Section 23 and, therefore, no appeal lay to the Appellate Assistant Commissioner under Section 30 of the Act and there was in consequence no question of a further appeal to the Tribunal under Section 33 of the Act. In the alternative, it was held that even if the Appellate Assistant Commissioner had wrongly declined to admit the appeal, his order was not an order under Section 31 and there could not, therefore, be an appeal under sub-section (1) of Section 33 to the Tribunal, and a reference to the High Court under Section 66.

Their Lordships said:

"Even if the order dated 26th September, 1945, made by the Income-tax Officer after the matter came back to him to give effect to the decisions of the Appellate Tribunal be

regarded as an order made by him under Section 23 or Section 27 and as such appealable under Section 30 (1) then the order made by the Appellate Assistant Commissioner on 19th November, 1945, declining to admit the appeal clearly amounted to a refusal on his part to exercise the jurisdiction vested in him by law. An order thus founded on an error as to his jurisdiction may conceivably be corrected by appropriate proceedings but it cannot certainly be regarded as such an order as is contemplated by any of the sub-sections of section 31. Such an order not coming within the purview of Section 28 or Section 31, no appeal lay therefrom to the Appellate Tribunal under Section 33 (1) and if no such appeal properly came before the Appellate Tribunal it could not properly make an order under Section 33 (4) and if there was no order under Section 33(4) there could be no reference under Section 68, sub-section (1) or sub-section (2)."

15. Learned Counsel for the assessee has urged that the view expressed by the Supreme Court in the alternative is 'obiter' and on the facts of the case the question did not arise as the assessee had not gone up in appeal to the Tribunal against the order of the Appellate Assistant Commissioner dated 19-11-1945, declining to admit the appeal but had moved the Tribunal by an application to correct the mistake made by the Income-tax Officer in his order dated 26-9-1945. Article 141 of the Constitution, however, provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India.

¹³ AIR 1953 SC 118

We must, therefore, consider ourselves bound by the law declared by the Supreme Court even though it was an alternative view taken by their Lordships.

16. In the case before us the Appellate Assistant Commissioner had held that the appeal was barred by limitation and sufficient cause had not been made out for condoning the delay. Whether his decision was right or wrong, in the view taken by their Lordships of the Supreme Court his order must be held to be an order under Section 30 (1) and not an order under Section 31. Our answer, therefore, to the first question is (a) that the order by the Appellate Assistant Commissioner refusing to admit the appeal on the ground that it was not presented within time was an order under Section 30 (1) of the Act, and (b) that since it was an order under Section 30 (1), no appeal lay to the Appellate Tribunal against that order.

17. In view of the Supreme Court decision that whether the Appellate Assistant Commissioner is right or wrong in not admitting the appeal the order cannot be an order under Section 31 the second question does not arise and the answer to the third question must be in the negative.

18. The answer to the fourth question must be that as no appeal lay to the Appellate Tribunal under Section 33, the Appellate Tribunal could not consider the question whether the Appellate Assistant Commissioner should or should not have condoned the delay.

19. The Department is entitled to its costs, which we assess at Rs. 500/-.

Answers accordingly